As regards the fourth ground of appeal argued before me even if the second prosecution witness were an accomplice and it was not on the evidence on the record established or even if that witness by his actions had brought himself within the class of people whom these Courts treat as accomplices there is nothing on the record to show that the Court below had failed to recognise that witness as an accomplice. The only thing that can be said is that the Court below did not refer to it in its grounds of judgment. For the appeal to succeed on this ground the Court would have to assume as against the Court below that the Court had not recognised it and had not warned itself as required by law. For myself, I doubt whether an appellate Court should make such an assumption especially where there is nothing upon which such an assumption could be based. However, it appears to me that having regard to the mandatory terms of section 321 of the Criminal Procedure Code this would not be a successful ground of appeal where there was as in this case in the evidence of the first and third prosecution witnesses ample corroboration.

As regards the sixth ground of appeal argued before me there is nothing on the record from which this Court would be justified in assuming the Court below had failed to give adequate consideration to the evidence of the two particular defence witnesses. The most that can be said is that the President has not referred to the witnesses by name or in detail to their evidence but has contented himself with the statement that he failed to agree with the story put up by the defence which has not cast any doubt on the prosecution story. Again, as I interpret section 321 of the Criminal Procedure Code the appellant has to satisfy me that the decision was against the weight of evidence, and it is therefore to a large extent immaterial what the Court below may or may not have considered or may or may not have referred to in its grounds of judgment as being considered.

As regards the seventh ground of appeal argued before me it is clear on the view that I take of section 321 of the Criminal Procedure Code that this is also to a large extent irrelevant if the appellant is unable to satisfy the Court pursuant to section 321 of the Criminal Procedure Code that giving due and proper weight to the evidence referred to the decision is against the weight of evidence. It was for this reason that I suggested to Mr. Marshall that an additional ground of appeal should be added that the decision was against the weight of evidence. On this ground I have perused the record and so far from being satisfied on the evidence the verdict was against the weight of evidence I have reached the conclusion that on the unshaken evidence for the prosecution the Court below could have reached no other conclusion than the guilt of the appellant, and that the eivdence adduced on behalf of the appellant as to a loan could not be accepted as evidence that might reasonably be true.

The appeal is therefore dismissed.

Appeal dismissed.

ALAGAPPA CHETTIAR v. COLISEUM CAFE

[C.A. (Thomson C.J., Hill and Good JJ.A.)
August 18 and December 13, 1961]

[K.L. — F.M. Civil Appeal No. 11 of 1961]

Landlord and Tenant — Claim for possession — Preliminary point as to whether value of subject matter is below $500 — Whether unincorporated body capable of assuming rights and obligations arising from relationship of landlord and tenant — Control of Rent Ordinance, 1956, s.12(1) — Courts Ordinance, 1948, s.37(1).

Partnership — Partners constantly changing — Whether capable of entering into relationship of landlord and tenant — Contracts (Malay States) Ordinance, 1950, s.206(g) and (j).

The appellant is the owner of premises known as No. 102 Batu Road and the respondent is a firm of partners carrying on business of a cafe and hotel in Nos. 98, 100 and 102 Batu Road. The present appellant brought an action in the Sessions Court for recovery of possession of his premises No. 102 and for mesne profits. The learned President was of the opinion that the defendant firm though registered as a business had not the power to become tenants as so constituted and he gave judgment for the appellant. The respondent appealed to the High Court and Hashim J. allowed the appeal. From this decision the appellant appealed to the Court of Appeal. A preliminary point was raised by counsel for the respondent that as "the amount or value of the subject matter at the trial is less than five hundred dollars" there was no right of appeal unless leave was obtained from the High Court or from the Court of Appeal. The only other point raised was whether the respondent being an unincorporated body having no legal personality was capable of assuming the rights and obligations of the relationship of landlord and tenant.

Held: (1) the mesne profits claimed must be taken into account in determining whether the amount or value of the subject matter was more or less than $500;

(2) in this case the respondent had not made out the allegation on which his preliminary objection rested;

(3) the letting in this case created the relationship of landlord and tenant between the previous landlord on the one hand and the partners on the other, and though there had been a change of partners over the years, members of each new partnership arising from each change by virtue of section 206(g) and (j) of the Contracts (Malay States) Ordinance, 1950, had continued *de jure* to assume obligations and enjoy benefits of the tenancy. This followed from the fact that when the tenancy agreement was made no reliance was placed upon the "personnel of the partners."

Cases referred to:—

(1) *Bramwell* v. *Bramwell*, [1942] 1 K.B. 370.
(2) *Mohideen Hadjiar* v. *Pitchey*, [1893] A.C. 193.
(3) *Bank of New South Wales* v. *William Owston* (1878-9), 4 App. Cas. 270, 274.
(4) *In re Sawers, Ex parte Blain* (1879), 12 Ch.D. 522, 533.
(5) *Sadler* v. *Whiteman*, [1910] 1 K.B. 868.

(6) *Ex parte Corbett* (1880), 14 Ch.D. 122.
(7) *Indo-Australian Trading Co.* v. *Hin Aun Huay Kuan & Ors.*, [1954] M.L.J. 163; [1956] M.L.J. 193, C.A.
(8) *Chartered Bank Trustee Ltd.* v. *Abu Bakar*, [1957] M.L.J. 40.
(9) *Wray* v. *Wray*, [1905] 2 Ch. 349.
(10) *Miles* v. *Clarke*, [1953] 1 All E.R. 779.
(11) *Blay* v. *Pollard & Morris*, [1930] 1 K.B. 628.
(12) *Esso Petroleum Co. Ltd.* v. *Southport Corpn.*, [1956] A.C. 218.
(13) *Thomson* v. *Glasgow Corpn.*, [1961] Scots L.T. 237, 247.
(14) *Facchini* v. *Bryson*, [1952] 1 T.L.R. 1386.
(15) *Sharpe* v. *Drummond*, 2 B. & A.D. 302.
(16) *Phillips* v. *Alhambra Palace Co.*, [1901] 1 Q.B. 59, 65.
(17) *Tasker* v. *Shepherd*, 6 H. & N. 575.
(18) *Servais Bouchard & Ors.* v. *Prince's-Hall Restaurant (Ltd.)*, 20 T.L.R. 574.

COURT OF APPEAL.

Peter Mooney for the appellant.

R. Ramani (*C. C. Rasa-Ratnam* with him) for the respondent.

Thomson C.J. (delivering oral judgment on a preliminary point): This appellant, who was the original plaintiff in the proceedings, is the registered proprietor of premises in Batu Road, Kuala Lumpur. He commenced the proceedings in the Sessions Court at Kuala Lumpur on 12th March, 1960. In his statement of claim he made certain averments with which I do not think we are concerned at this stage and he concluded by asking for an order that the defendant deliver up vacant possession of the premises and that the defendant should pay him mesne profits at the rate of $74 a month from the 1st day of February, 1959. At the date of the commencement of proceedings the total amount of mesne profits thus claimed was something like $900.

The plaintiff was successful in his action in the Sessions Court and on 27th September, 1960, obtained an order, as prayed, for possession and for a considerable sum by way of mesne profits.

Against that decision the defendant appealed to the High Court. He did so successfully and the decision of the Sessions Court was set aside by Mr. Justice Hashim. Against that decision of Mr. Justice Hashim the plaintiff (the present appellant) has appealed to this Court on grounds which it is not necessary to discuss at this stage.

In limine counsel for the defendant has taken the preliminary point that, to quote the words of the statute, "the amount or value of the subject-matter at the trial is less than five hundred dollars" and therefore there is no right of appeal unless leave is obtained from the High Court or from this Court. It is common ground that such leave has not been obtained for the very simple reason that it has not been asked for and therefore the appeal is incompetent.

In my view the preliminary point must fail and I propose to state, briefly, my reasons for saying so.

The original claim was by a registered proprietor for possession of the premises of which he is the proprietor and in addition a sum for mesne profits which, whatever it may be exactly, was admittedly at any date that can possibly be material more than $500. Mr. Ramani, however, has argued and argued very persuasively that what was really in issue was possession of the premises and that the claim for mesne profits was an ancillary one which should be disregarded in the present connection. I am not quite sure what the word "ancillary" means in this connection. I have, however, grave doubts as to whether in any sense it is an appropriate epithet in the present case. What I have in mind is much better expressed than I can express it myself by Goddard L.J. in the case of *Bramwell* v. *Bramwell* [1]. I will read what his Lordship said (at p. 373):—

> "An action for the recovery of land is the modern equivalent of the old action of ejectment: That action was a personal action and could only sound in damages. Then in favour of this class of remedy the Courts determined that the plaintiff was entitled to recover as collateral and additional relief possession of the land itself (see *Stephen* on Pleading, 3rd ed., p. 12), but it was in fact always a species of the action of trespass."

In other words if anything is ancillary to anything else it is the claim for possession that is ancillary to the claim for mesne profits.

On that alone I should say that the mesne profits must be taken into account in this connection and support is to be found for that view, although of course not for the reasoning that has led to it, in the Privy Council case of *Mohideen Hadjiar* v. *Pitchey* [2] particularly when the decision in that case is read in the light of what was said by Sir Montague Smith in the earlier case of *Bank of New South Wales* v. *William Owston* [3].

For these reasons I would dismiss the preliminary objection, but in case these reasons be not well-founded I would approach the matter from another point of view.

Section 36 of the Courts Ordinance, 1948 gives this Court a general power (the word used is "jurisdiction" but I think that is meant in the sense of "power") to hear appeals from any judgment or order of the High Court in any civil matter, whether made in the exercise of its original or of its appellate jurisdiction, subject to the provisions of the Ordinance. Section 37 derogates from the generality of that provision by providing that in certain cases no appeal shall be brought and one of these cases is where the amount or value of the subject-matter at the trial is less than $500.

To my mind the two sections are to be read together and it is for any party who alleges that the case falls within one of the exceptions set out in section 37 to prove his case, that is to say, to direct our attention to something that has been either proved or has been admitted or is capable of showing that the allegation of fact on which his objection rests is made out.

The allegation here, of course, is that the amount or value of the subject-matter at the trial was less than $500. There is very little evidence of any sort in the case and for myself

I cannot see any sufficient reason for saying that the value of the possession claimed is less than $500. I am not satisfied, having read the evidence, that it has been made out that, apart from the mesne profits, the value of the other relief asked for was less than $500.

I would dismiss the objection.

Hill and Good JJ.A. concurred.

The Court of Appeal on December 13, 1961 delivered the following judgments on the main issue.

Thomson C.J.: I have had the benefit of reading the judgments of Hill J.A. and Good J.A. with which I am in agreement and would only add a very few words of my own.

In my view the questions which have been canvassed before us are more suitable for discussion in a law students' debating society, preferably in association with a society for psychical research, than in a Court of Law.

On the plaintiff's statement of claim his case never had a leg to stand on.

The defendants, whoever they may be, are clearly not ghosts. A landlord does not come to a Court of Law nor does he employ a lawyer to rid his premises of ghosts. He goes to another sort of practitioner. Nor are the defendants associated in any way that gives them any legal personality which is known to the law distinct and apart from their natural personalities. James L.J. said in the year 1879: "We have not yet introduced into our law the notion that a firm is a *persona*" (*In re Sawers, Ex parte Blain* (4)). Whatever be the law of Scotland or the law of America, that is still in the year 1961 true of the law of England and it is with the law of England that we are concerned here. As far as I am aware there is nothing in the Contracts Ordinance or in the Partnership Ordinance or anywhere else in our local statute law that varies the law of England in this respect. Nor, I would add, is there anything which affects the capacity of partners to enter into joint contractual relations.

Again, joint tenants are joint tenants irrespective of whether or not the relationship between themselves be also that of partners and there is nothing in the Land Code or the Control of Rent Ordinance even to suggest that their relationship with their landlord differs in any material way from that of an individual tenant; there is nothing to exclude the ordinary rule of interpretation that the singular includes the plural (see Interpretation and General Clauses Ordinance, section 2(95)).

The premises in question here are in Batu Road, Kuala Lumpur, the paradise of statutory tenants, and they were erected prior to 31st January, 1948. They are clearly, therefore, within the scope of the Control of Rent Ordinance and the plaintiff has not even alleged any circumstances that would bring the case within any of the exceptions to section 12 of the Ordinance.

I would dismiss the appeal with costs.

Hill J.A.: These proceedings commenced in 1960 in the Sessions Court, Kuala Lumpur, when the present appellant sought for:

> (a) For an order that the defendant do forthwith deliver up vacant possession of premises No. 102 Batu Road, Kuala Lumpur to the plaintiff.
>
> (b) That the defendant do pay to the plaintiff mesne profits at the rate of $74 per month from the 1st day of February, 1959 to the date of delivery of possession.

The learned President was of the opinion that the partnership known as the Coliseum Cafe and Hotel, although registered as a business, had not the power to become tenants as so constituted and he gave judgment for the appellant as prayed.

From this decision the respondent appealed to the High Court and Hashim J. allowed the appeal. The learned Judge stated:

> "I think this appeal can be disposed of on one simple ground only, that the name under which a firm carries on business is in point of law a conventional name applicable only to the persons who, on each particular occasion when the name is used, are members of the firm:' see *Lindley on Partnership*, 11th Ed., p. 155. That is to say, the letting of the premises to the 'Coliseum Cafe' was a letting to the persons who for the time being were or are the constituent partners carrying on business under that firm's name. A partnership is emphatically not an incorporated body, but a horse of a different colour altogether."

He went on to say:

> "The learned President, in his grounds of judgment, was 'of the opinion that the partnership known as the Coliseum Cafe and Hotel, although registered as a business, have not the power to become tenants as so constituted.' With all respect, I do not agree. A single individual can be a tenant, and equally can eight partners be joint tenants. Any proposition to the contrary is fantastic."

The learned Judge considered sections 10, 47 and 42(v) of the Land Code and held that when the respondent took the transfer of the premises in January, 1959, he did so subject to the rights of the appellants/defendants as tenants in possession. Hashim J. was satisfied that the premises were clearly "premises" within the purview of the Control of Rent Ordinance and that the then respondent's claim to possession did not come within any of the grounds set out in section 12(1).

The facts were not in dispute. The present appellant on 21st January, 1959 became owner by purchase of premises No. 102, Batu Road, Kuala Lumpur. His predecessor in title was another chettiar. For about 38 years prior to the change of ownership a partnership carrying on business under the name of Coliseum Cafe and Hotel was in uninterrupted occupation of two adjoining premises to which they added premises No. 102, Batu Road in 1934. The firm which was registered under the Registration and Licensing of Businesses Ordinance 1953, on 26th October 1953, consists of eight partners at the material time. The respondents are sued as a firm in the given name.

On 5th March, 1959, the appellant wrote to the respondents demanding particulars of who was the tenant of the premises and of how the tenant came to be in occupation. The reply on 9th March, 1959 stated, *inter alia*, that the tenants were the Coliseum Cafe.

On 21st April, 1959 the appellant "determined" the defendants' tenancy by a notice to quit expiring on 30th May, 1959. The respondents remained in occupation and on 12th March, 1960, the appellant commenced his action for possession on the ground set out in paragraph 7 of the statement of claim, which was as follows:

"The plaintiff contends and will contend that the defendant being an unincorporated body and having no legal personality is incapable of entering into any contractual relations and incapable of assuming the rights and obligations arising from the relationship of landlord and tenant and as such is not entitled to the protection of Control of Rent Ordinance, 1956."

Before this Court Mr. Ramani for the respondent raised a preliminary objection that in view of section 37(1)(a) of the Courts Ordinance the Court of Appeal had no power to hear the appeal unless leave to appeal had been granted by Hashim J. in accordance with section 17 of the Ordinance.

Mr. Ramani's objection was overruled in a short oral judgment by the learned Chief Justice with which Good J.A. and I agreed. A copy of this oral judgment is attached hereto. *

It remains therefore to be decided whether the learned President, who was Mr. G. C. Byrne, or Hashim J. was correct on this somewhat novel proposition.

In their defence before the Sessions Court the respondents pleaded an alternative defence as follows:—

"In the alternative, it will be contended on behalf of COLISEUM CAFE AND HOTEL, that the premises known and numbered as No. 102 Batu Road, Kuala Lumpur, was let to an individual as an agent for and on behalf of COLISEUM CAFE AND HOTEL by the previous owner of the said premises — Mr. NR. L. Murugappa Chettiar who carried on a business under the business 'VILASAM' of Mr. L. at No. 85 Ampang Street, Kuala Lumpur, and as it will be so proved."

This defence was not made out at all and can be disregarded. I think it must be conceded that the registered business known as the Coliseum Cafe and Hotel cannot of itself be a tenant. On the other hand the partners and owners of the business individually and collectively can be and in fact were originally the tenants of the premises. The tenancy was a monthly one and there is no evidence of any written lease or agreement.

Over the years, 38 of them, partners have come and gone and it was contended by Mr. Mooney that without proper transfers by retiring partners to their successors any rights of tenancy could not be passed on and continue.

In spite of the fact that there appears to have been no written agreement or lease this contention might be sound if there was some evidence to go on. But there is a complete lack of any evidence on this point and I feel I would be quite unjustified in attempting to arrive at any finding or conclusion thereon one way or the other. Moreover, I consider that the onus of proof in this regard is on the appellant who raised the point. In this connection it is worthy of note that Loi Tin Hoy, the managing partner of the Coliseum Cafe and Hotel, was one of the original partners in 1921.

It seems to me that if any conclusion can reasonably be drawn it is that the original owner, from whom the appellant purchased the premises, at least acquiesced in the changes in partnership and possibly approved and accepted them. When therefore the appellant acquired the property he did so subject to a monthly tenancy containing the above conditions.

Though I am unable to agree with Hashim J. that the Land Code can properly be applied to a monthly tenancy of this nature which I do not think can be regarded as a form of lease as contemplated by the Code, nevertheless I agree with him that the premises occupied by the Coliseum Cafe and Hotel were "premises" within the purview of the Control of Rent Ordinance.

I would accordingly dismiss this appeal with costs and order the deposit to be paid out to the respondent.

I have referred to the following cases which were cited by counsel, not all of which have I found to be of assistance. *Sadler* v. *Whiteman* [5] at p. 889 *per* Farwell L.J., *Ex parte Corbett* [6] at p. 126 *per* James L.J., *Indo-Australian Trading Co.* v. *Hin Aun Huay Kuan & Ors.* [7], *Chartered Bank Trustee Ltd.* v. *Abu Bakar* [8], *Wray* v. *Wray* [9], *Miles* v. *Clarke* [10] at p. 782 *per* Harman J., *Blay* v. *Pollard & Morris* [11] *per* Scrutton L.J. at p. 634, *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [12] *per* Lord Normand at p. 239, and *Thomson* v. *Glasgow Corpn.* [13].

Good J.A.: I agree with the judgment which my brother Hill has just delivered, and will state my reasons for doing so. The appellant is the owner of premises known as No. 102 Batu Road, Kuala Lumpur, which he bought on 21st January, 1959 from one Murugappa Chettiar whom I will call the previous landlord.

The respondent is a firm of partners carrying on the business of a cafe and hotel in Nos. 98, 100 and 102 Batu Road. The business was started in 1921 in Nos. 98 and 100 under the name of the Coliseum Cafe and in 1934 the accommodation occupied by the firm was enlarged by renting the adjoining premises No. 102 from the previous landlord. The name of the firm was later changed to the Coliseum Cafe and Hotel.

The present appellant brought an action in the Sessions Court for recovery of possession of the premises No. 102. There is no provision in the Subordinate Court Rules for suing the members of a partnership in the firm name as was done in this case. Order 48A rule 1 provides for this method of suing in the High Court and it would appear that the present appellant as plaintiff in the action in the Sessions Court elected to follow the procedure provided in that rule as if it applied to proceedings in the Sessions Court. I think that this may have caused some

* The judgment on the preliminary point appears at p. 112, *supra*.

confusion in the minds of the President and counsel as to the true identity of the defendant in the Sessions Court action. It is unfortunate that the "defendant" was referred to in the singular. It might have resulted in a clearer appreciation of the nature and consequences of partnership if the Coliseum Cafe had been described as the "defendants" as in the specimen pleadings set out in *Bullen and Leake.*

The appellant did not rely on any of the permissive grounds of recovery set out in section 12(1) of the Control of Rent Ordinance, 1956. He founded his action upon a notice to quit dated 21st April, 1959 and expiring on 30th May, 1959. I do not think it necessary, for the purposes of this appeal, to consider whether or not the notice was good, but there is plenty of authority for the rule that in the case of a monthly tenancy a notice to quit served before the end of a month should be expressed to expire on the last day of the calendar month next following.

The appellant pleaded that the respondent was not protected by the Control of Rent Ordinance, 1956, on the ground that being an unincorporated body having no legal personality it was incapable of entering into any contractual relations and incapable of assuming the rights and obligations arising from the relationship of landlord and tenant. The respondent pleaded, in my opinion wrongly or at least ambiguously, that the Coliseum Cafe and Hotel were the proper defendants and that they were a registered partnership having a legal personality and capable of entering into contractual relations and assuming the rights and obligations arising from the relationship of landlord and tenant which rights they enjoyed through the protection of the Control of Rent Ordinance, 1956.

This was the only issue in the case. An alternative defence, that the premises were let to an individual as agent for the Coliseum Cafe and Hotel, was pleaded but in effect was abandoned and may be disregarded. The facts, of which there was very little evidence, were not in dispute.

The President decided in favour of the appellant on the ground "that the partnership known as the Coliseum Cafe and Hotel, although registered as a business have not the power to become tenants as so constituted."

In the appeal to the High Court Hashim J. decided in favour of the present respondents on the following grounds:

"I think this appeal can be disposed of on one simple ground only, that 'the name under which a firm carries on business is in point of law a conventional name applicable only to the persons who, on each particular occasion when the name is used, are members of the firm:' see *Lindley on Partnership*, 11th Ed., p. 155. That is to say, the letting of the premises to the 'Coliseum Cafe' was a letting to the persons who for the time being were or are the constituent partners carrying on business under that firm name.

The learned President, in his grounds of judgment was 'of the opinion that the partnership known as the Coliseum Cafe and Hotel, although registered as a business, have not the power to become tenants as so constituted.' With all respect, I do not agree. A single individual can be a tenant, and equally can eight partners be joint tenants. Any proposition to the contrary is fantastic.

References to sections 10 and 47 of the Land Code are also beside the point. The tenancy in this case was a monthly tenancy on the plaintiff's own showing, if his notice to quit means anything. Under section 118 of the Land Code a lease or agreement for a lease not exceeding one year shall be valid without registration. A month-to-month tenancy comes within such category. By section 42(v) of the Land Code 'when at the time the proprietor becomes registered a tenant shall be in possession of the land under a unregistered lease or agreement for a lease or for letting for a term not exceeding one year the title of the tenant under such lease or agreement shall prevail.'

Consequently, when the plaintiff took the transfer of the premises on 21st January, 1959, he did so subject to the rights of the defendants as tenants in possession."

The appellant appeals to this Court on the following grounds:

1. If the statement in the judgment of the learned Judge that "the letting of the premises to the Coliseum Cafe" was a letting to the persons who for the time being were or are the constituent partners carrying on business under the firm name is —

(a) a general statement of the law, the learned Judge was wrong in law;

(b) applicable only to the circumstances of this case, there is no evidence to support it.

2. The learned Judge erred in law in that he failed to decide the case upon the pleadings and, on the contrary, decided it on a defence which was not advanced and which the appellant had no opportunity of meeting.

The appellant relies on the respondent's pleadings, on the evidence of the managing partner of the firm and on a letter (Exh. P. 2) written by the assistant manager of the firm in reply to a questionnaire sent to him by the appellant on 8th March, 1959, all of which, the appellant asserts, contain admissions by the respondent that the tenant of the premises is the Coliseum Cafe and Hotel. That being so, says the appellant, the respondent cannot have the benefit of a different defence, which was not pleaded, that the letting was to individuals trading under that name, and the learned Judge was wrong in taking that view which was contrary to the pleadings and the evidence.

In *Facchini* v. *Bryson* [14], where the question was whether an agreement operated as a tenancy agreement or as a mere licence to occupy, Denning L.J. said: "Their relationship (i.e. the relationship between the parties) is determined by the law and not by the label which they choose to put on it."

What, then, is the true position in law of this partnership calling itself the Coliseum Cafe and Hotel (for that was the first question which the Court had to decide irrespective of what the partners may elect to call themselves)? Section 192 of the Contracts (Malay States) Ordinance, 1950, defines partnership as the relation which subsists between persons who have agreed to combine their property, labour, or skill in some business, and to share the profits thereof between them (and I would emphasise the words "the relation which subsists between persons"). In *Sadler* v. *Whiteman* [5] Farwell L.J. said: "The fallacy is to say that a partner in a firm does not, but the firm does, carry on business. In English law the firm as such has no existence; partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression, not a legal entity, although for convenience under Order 48A it may be used for the sake of suing and being sued." In *Ex parte Blain, in re Sawers* [4] James L.J. said: "I cannot help thinking that some difficulty may arise with regard to that provision of the Judicature Rules which enables partners to be sued in the name of the firm, because we have not yet introduced into our law the notion that a firm is a *persona*." In Scotland the position is different because there a firm is a legal *persona*: section 4(2) of the Partnership Act, 1890.

On these two authorities, which seem to me to be entirely consistent with the definition of partnership in our local Ordinance, the Coliseum Cafe and Hotel, as such, is not a legal *persona*, but a label used by a number of individuals trading in partnership under that name. No argument by the appellant or so-called admission by the respondent can alter that position. If a party asserts the existence of something that is an impossibility in law, his assertion cannot make it exist and it falls to the Court to assign the proper legal characteristics to the thing in question.

The appellant submits that by reason of sections 10 and 47 of the Land Code the Coliseum Cafe and Hotel cannot hold land under a lease and it is of course perfectly true that a lease cannot be granted to a "label." Apart, however, from the fact that I entertain doubts as to whether these sections have any application to monthly tenancies, it is in any event perfectly clear that if such a tenancy is to be regarded, as Hashim J. thought it should be, as a lease of alienated land for a term not exceeding one year then the persons who are members of a partnership may be the lessees of such lease. Section 47 says that a proprietor shall have the right to lease his land to any such individual person, company or body corporate as is in section 10 mentioned, and section 10 says that State land may be alienated only to an individual person, not being a minor, or to certain specified bodies which are not relevant to the present case. If a proprietor has the right to lease his land to an individual person, then he has the right to lease it to any number of individual persons jointly; words in the singular include the plural: the Interpretation and General Clauses Ordinance, 1948, section 2(1) (95). If this is a lease, the partners are joint lessees; if it is not, they are trading as partners and occupy the premises for the purposes of the partnership business and they are jointly liable, under the law of partnership, for the obligations of the tenancy; and they enjoy community of interest in the partnership assets, which would include a tenancy of the premises in which the partnership business is carried on.

On the evidence I agree with the learned trial Judge that this was a letting by the previous landlord to the persons who for the time being were partners carrying on business under the name of the Coliseum Cafe; and I have no hesitation, on the law, in holding that such a letting created the relationship of landlord and tenant between the previous landlord on the one hand and the partners on the other.

Having arrived at the conclusion that such is the position in law, I think it necessary to give some consideration to its effect where persons who have been carrying on business in partnership for many years under a trade name have entered into continuing contracts with other persons and the partners who constitute the firm when an action is brought against the firm are not the same individuals who were the partners when the contract was made. There is evidence in the present case of changes which have taken place from time to time in the identity of the partners. The present managing partner, Mr. Loi Tin Hoy who was the only witness for the defendant in the Sessions Court has himself been a partner since the commencement of the business in 1921 but he says "from 1921 onwards partners have come and gone" and he gives one specific instance of a person who was a partner and manager from 1934 to 1940 when the remaining partners bought him out and Mr. Loi himself became managing partner in his place. James L.J. in the case of *Sawers* to which I have already referred foresaw something of the difficulty when he said, in continuation of the passage already quoted: "What I mean is this, supposing there to have been an entire change in the constitution of the firm, and that, although the name of the firm continued, the firm at the time when the action was brought consisted of entirely different persons from those of whom it consisted at the time when the contract was made; for instance, if A., B., and C were the partners at the time of the action, and E., F., and G. at the time of the contract." Brett L.J.

added: "I quite agree; it may be that under such circumstances you could not sue the firm."

A well drawn partnership agreement will contain provision for what is to happen with regard to existing rights and obligations when a partner dies or retires or becomes incapable of continuing in the partnership and when a new partner joins the firm. Usually it is provided that the remaining partners will take over the rights and obligations of the outgoing partner under subsisting contracts and that an incoming partner will assume his proper share of such rights and obligations. In a well conducted partnership business notice will be sent to the regular customers of the firm and those who have contracts with it that Mr. X. has died or retired and that Mr. Y. has taken his place. There is no evidence that this was ever done in the case of the Coliseum Cafe either generally or in relation to the tenancy of No. 102 Batu Road. There never has been any written agreement between the partners of this firm any more than there has been any written tenancy agreement between them and their landlord. Such informality in business relationships is no doubt an admirable thing as demonstrating a high degree of mutual confidence but when disputes arise and litigation ensues it does not assist the Courts in arriving at findings of fact. By reason of the course which this case took in the Sessions Court where both parties were *ad idem* in regarding the Coliseum Cafe and Hotel and not the individuals trading under that name as the defendant no cross-examination was directed to obtaining from the managing partner any details of the changes which had taken place in the partnership or any evidence of notice of such changes having been given to the previous landlord.

Under paragraphs (g) and (j) of section 206 of the Contracts (Malay States) Ordinance, 1950, every time a member of a partnership ceases to be a partner the old partnership is dissolved by operation of law and a new partnership comes into existence. The question is whether the members of such unascertained new partnerships as have come into existence from time to time under the name "Coliseum Cafe" or "Coliseum Cafe and Hotel" continued *de jure* to assume the obligations and enjoy the benefits of the tenancy as *de facto* they have done up to the present time.

The test seems to lie in whether the contract is of such a personal nature that the identity of the persons with whom he has to deal makes a real difference to the other party to the contract. In *Robson and Sharpe* v. *Drummond* [15] which concerned a continuing contract for hire of a chariot Lord Tenterden said:

> "The defendant may have been induced to enter into this contract by reason of the personal confidence which he reposed in Sharpe, and therefore have agreed to pay the money in advance. The latter, therefore, having said it was impossible for him to perform the contract, the defendant had a right to object to its being performed by any other person, and to say that he contracted with Sharpe alone, and not with any other person."

It was, however, a relevant circumstance in that case that the agreement for the hire of the chariot, which was for a term of five years, included a stipulation that the vehicle was to be "jobbed" (which we would now call "serviced") by Sharpe: he was to keep it in necessary repair, to supply new wheels when required, and to paint it once during the term. This arrangement introduced the element of personal service. But in *Phillips* v. *Alhambra Palace Company* [16] which concerned a contract between a troupe of music hall performers and a partnership carrying on the business of music hall proprietors for a certain performance to be given in the latter's music hall, it was held that the contract was not of such a personal character on the part of the partnership as to be put an end to by the death of the deceased partner; and Kennedy J. said at page 65, with reference to the case of *Tasker* v. *Shepherd* [17] which he was there considering,

> "The real ground of the decision was that the contract had reference to the existing partnership business only. So I can conceive that a contract such as we have to deal with in the present case might be made under circumstances under which it would be unjust to compel the plaintiffs to perform for the surviving partners, and under which it would be equally unjust to compel the surviving partners to employ them. But here, if the plaintiffs are provided with the agreed stage on which to perform, and are only required to perform at the agreed time and under the agreed conditions, it surely cannot matter to them who the particular persons are by whom they are to be paid. The case does not fall within the decision of *Tasker* v. *Shepherd*."

Judgment to the same effect and for similar reasons was given by the Court of Appeal in the case of *Servais Bouchard & Ors. (Trading as Bouchard Aine et Fils)* v. *The Prince's Hall Restaurant (Limited)* [18], which concerned a contract for the sole right to supply wine to a restaurant. There is a most apposite observation by Stirling L.J. at p. 575: "There was no evidence of reliance being placed by the defendants on any particular member of the plaintiff firm."

Applying the principle to the present case, I would not hesitate to put it in the category of cases, of which *Phillips* v. *Alhambra Palace Company* is an example, where, as Lord Alverstone said in that case, the other party to the contract "did not rely on the personnel of the partners." It cannot really matter to the landlord of No. 102 Batu Road who the individuals are who carry

on business there as his tenants as long as the rent is regularly paid, the business is decently conducted and the premises are not allowed to suffer damage or to fall into disrepair. If the landlord has any complaint on any of these grounds there are remedies open to him which are not available in the circumstances of the present case.

Here, then, is a tenancy created by the letting of the premises by the previous landlord to the partners of the firm. That tenancy continued up to the date when the ownership of the premises passed to the appellant. Under section 42(v) of the Land Code which, it is to be noted, unlike section 47 applies to agreements for letting as well as to leases and agreements for leases, the title of the tenant in possession is safeguarded in the event of a change of ownership. The Control of Rent Ordinance, 1956 restricts the landlord's right to possession to the cases set out in section 12(1), and the appellant has not attempted to bring himself within any of these cases. Consequently, his claim for an order for recovery of possession must fail.

For these reasons I would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Bannon & Bailey; Braddell & Ramani.*

YEOW KIM PONG REALTY LTD. v. NG KIM PONG

[P.C. (Lord Hodson, Lord Guest and the Rt. Hon. L. M. D. de Silva) December 18, 1961]

[Privy Council Appeal No. 6 of 1960]

Contract — Agreement for sale of land — Payments to be made on or before specific dates — Non-payment of — Request for extension of time — Supplementary agreement — Whether binding — Whether appellant entitled to rescind original contract — Interpretation of s.56(3) of the Contracts (Malay States) Ordinance.

The plaintiff (the respondent on this appeal) on March 24, 1956, entered into an agreement with the defendant (the appellant on this appeal) for the purchase of 22 lots of land. It was one of the terms of the agreement that an initial payment of $15,000 should be made followed by a further sum of $24,000 on or before June 28, 1956 and a final payment of $27,000 on or before December 23, 1956. The respondent failed to pay the stipulated $24,000 by the date specified and the appellant informed the respondent that in consequence the deposit of $15,000 was forfeited and the contract was at an end. The respondent then asked for an extension of time to pay the said $24,000. The appellant agreed to an extension of time provided that certain conditions as laid down in a supplementary agreement were satisfied, namely:

1. To pay . . . $5,000 forthwith and the balance of $19,000 to be paid on or before July 31, 1956;
2. Construction work on the above land to be commenced within one week of the date hereof;
3. Construction must have begun on any land that was sought to be transferred; and
4. Should there be any breach of the above conditions, the $5,000 paid, was to be forfeited and the extension of time withdrawn.

The respondent having failed to abide by this supplementary agreement, the appellant terminated the contract by writing on September 1, 1956 and forfeited the moneys paid.

The question then arose as to whether the supplementary agreement was binding on the respondent.

The trial Judge held that the supplementary agreement was binding on the parties, and as the respondent was in breach of it, he dismissed his action. This decision was reversed by the Court of Appeal.

On appeal to the Privy Council,

Held: (1) the supplementary agreement was binding on the parties and time was of the essence of this agreement;

(2) there was a breach of this agreement by the respondent and appellant was entitled to rescind the contract on September 1, 1956 as he did;

Per Curiam: Sub-section (3) of section 56 of the Contracts (Malay States) Ordinance does not place a limitation upon the freedom of parties to contract when one of them has failed to perform his promise at the time agreed. ..... All the sub-section says is that where a party accepts performance without such agreement that party may not in a subsequent action claim compensation for non performance at the time agreed unless at the time of accepting performance he has given notice of his intention to do so.

Decision of the Court of Appeal [1960] M.L.J. 92 reversed.

PRIVY COUNCIL.

John Foster, Q.C. (*W. W. Stabb* with him) for the appellant.

J. A. Wolfe for the respondent.

The judgment of their Lordships was delivered by

The Rt. Hon. L. M. D. de Silva: This is an appeal from a judgment and decree of the Court of Appeal at Kuala Lumpur Supreme Court which reversing a judgment of the High Court entered judgment in favour of the plaintiff (the respondent on this appeal) against the defendant (the appellant on this appeal) for the return of a deposit made by the plaintiff on an agreement for the purchase by him from the defendant of 22 lots of land and for damages for the breach thereof by the defendant.

The following recitals and clauses of the agreement are relevant to the matters in dispute between the parties:

" Whereas the Vendor has caused Building Plans prepared by Lee Eng Tong of No. 24, Sultan Street, Klang (hereinafter called the Architect) which have been approved by the Town Council, Klang, under Plans Nos. 185/55, 185A/55, 185B/55, 185C/55 and 185D/55 for the erection of 21 Terrace Houses on the said Property:

And Whereas the Purchaser intends to erect the said 21 Terrace Houses for sale and agrees to give priority for such sale to the 36 Tenants of the Vendor of premises known as Nos. 102, 104, 106, 108, 110, 112, 114, 116, 118, 120, 122, 124, 126, 128, 130, 132, 134, 136, 138, 140, 142, 144, 146, 148, 150, 152, 154, 156, 158, 160, 162, 164, 166, 168, 170 and 172 Meru Road, Klang (hereinafter called the Tenants):

And Whereas the Vendor has agreed to sell and the Purchaser has agreed to purchase the said Property for the sum of Dollars Sixty-six thousand ($66,000.00) only and the Vendor agrees to transfer such lot or lots of the Property described in the said Schedule to the Purchaser or any of his nominees or assigns free from all encumbrances as the Purchaser shall elect subject to the terms and conditions as mentioned hereafter:

NOW THIS AGREEMENT WITNESSETH as follows:—

1. Now in consideration of the above premises and in consideration of the sum of Dollars Fifteen thousand ($15,000.00) only paid by the Purchaser to the Vendor, the receipt whereof the Vendor hereby acknowledges, as